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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN CURRIER,

Petitioner,

v.

ROSALIND FOGEL and GERALD FOGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Petitioner Currier, a garment industry executive, was a director of American Investors Fund, Inc. (the "Fund"), a mutual fund of which respondents are shareholders. In 1975, the Court of Appeals for the Second Circuit held the Fund's investment adviser (the "Adviser"), three management directors and Currier liable for failing adequately to inform outside directors concerning opportunities to recapture brokerage commissions.*

The court noted that Currier, the only unaffiliated, non-management director who had been served with the complaint, was a "special case" due to his outsider status. The court nevertheless held him liable, despite his demonstrated lack of knowledge concerning the complex subject of brokerage commission recapture, because he owned between one and two percent of the Adviser's shares during the period at issue.

The question presented by the Second Circuit's decision as to this petitioner is:

> (1) Whether an unaffiliated director of a mutual fund, with no background in the investment business and no knowledge concerning recapture of brokerage commissions, may be held liable under the Investment Company Act for breach of fiduciary duty to the fund's shareholders for failing to inform his fellow unaffiliated directors of recapture opportunities, solely on the basis of his small ownership interest in the investment adviser to the fund?

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* The parties to the proceedings in the court below, in addition to the parties named in the caption, are George A. Chestnutt, Jr., Warren K. Greene, Stanley L. Sabel, American Investors Corporation and Chestnutt Corporation, who were named as defendants.

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Petitioner John Currier ("Currier") respectfully petitions for a writ of certiorari to issue to review so much of the judgment of the United States Court of Appeals for the Second Circuit, entered on December 17, 1981, as held (1) that there is an implied private cause of action under the Investment Company Act against directors of a mutual fund for failure to inform the fund's non-management directors of the possibility of recapturing brokerage commissions and (2) that petitioner Currier, a non-management director of the fund, was liable under the Investment Company Act for breach of fiduciary duty for failing to inform the other non-management directors about the possibility of recapture. With respect to the first holding, Currier joins in the arguments presented on behalf of petitioners George A.

Chestnutt, Jr., Warren K. Greene, Stanley L. Sabel, American Investors Corporation and Chestnutt Corporation, who were Currier's co-defendants below, in their separate petition for a writ of certiorari. This petition is addressed solely to the error committed by the court below with respect to the second holding.

OPINIONS BELOW[1]

The court of appeals has written two opinions in this litigation. The more recent opinion is reported at 668 F.2d 100 (2d Cir. 1981) (*"Fogel II"*) (A-2).[2] The opinion of the district court from which the appeal in *Fogel II* was taken is reported at 493 F. Supp. 1192 (S.D.N.Y. 1980) (A-39). The first opinion of the court of appeals is reported at 533 F.2d 731 (2d Cir. 1975) (*"Fogel I"*) (A-77), *cert. denied*, 429 U.S. 824 (1976). *Fogel I* reversed the district court's dismissal of the case after trial on the merits in a decision reported at 383 F. Supp. 914 (S.D.N.Y. 1974) (A-122).

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1981. A timely petition for rehearing and suggestion for rehearing en banc was denied on February 22, 1982. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Investment Company Act, 15 U.S.C. § 80a-2(a)(3) and § 80a-2(a)(19) (1981), are set forth in a statutory appendix at the end of this petition.

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1. The opinions below are reprinted in the appendix being filed by Currier's co-defendants in support of their petition for certiorari. References in the form "A- " refer to the appendix to the petition of George A. Chestnutt, Jr. et al., for a writ of certiorari.

2. Petitions for rehearing were denied by order of the court on February 22, 1982. (A-1.)

STATEMENT OF THE CASE

Prior Proceedings[3]

In *Fogel I*, the Court of Appeals for the Second Circuit, relying on the First Circuit's decision in *Moses v. Burgin*, 445 F.2d 369 (1st Cir.), *cert. denied*, 404 U.S. 994 (1971), found that the Adviser and management directors had breached their fiduciary duties to the Fund shareholders by failing adequately to inform the Fund's "independent" directors about possibilities for recapture.[4] (A-108.) As to Currier, the court reasoned:

> "defendant Currier is a special case; although he could be counted as unaffiliated until December 14, 1970, because of his small stock ownership in the Adviser he was in fact not disinterested. We therefore include him with the defendants held to be liable."

(A-108 to -109.)[5]

The court of appeals directed the district court on remand to apportion damages among defendants, petitioners here, and to impose primary responsibility on the Adviser, "which profited from the failure to recapture." (A-109.) On remand, the district court referred the case to a magistrate for a damage hearing. In 1978 the magistrate assessed approximately $350,000 in damages jointly and severally against all petitioners, finding no evidentiary

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3. The proceedings involving all defendants below are summarized by petitioners, George A. Chestnutt, Jr. et al., in their separate petition for certiorari. This petition describes only the prior proceedings particularly relevant to Currier's independent arguments.

4. The court of appeals defined the term "independent" so as to exclude Currier from the definition. The term included any director of the Fund who was both not "interested" (15 U.S.C. § 80a-2(a)(19)) after December 14, 1970 *and* not "affiliated" (15 U.S.C. § 80a-2(a)(3)) prior to December 14, 1970. (A-97 n.38.) Due to his ownership of Adviser stock, Currier was statutorily "interested" after December 14, 1970.

5. It should be noted that Currier was in fact "unaffiliated" at all times both before and after December 14, 1970, because he owned less than 5% of the Adviser stock. The "interested" category introduced at the end of 1970 did not supplant the pre-existing "affiliated" category for all purposes.

basis on which to apportion damages, since none had been presented to distinguish Currier from the other defendants, all of whom were represented by common counsel. (A-65.) On June 19, 1980, the district court modified the magistrate's findings on damages, but approved his finding on the issue of apportionment. Final judgment in the amount of $3,919,220 was entered on June 27, 1980. (A-37 to -38.)

Upon Currier's separate appeal from this decision, the Second Circuit agreed that the district court had erred in failing to apportion liability according to relative degree of fault and reduced Currier's liability to an amount relative to the size of his interest in the Adviser. (A-35 to -36.) The court adhered, however, to its holding in *Fogel I* that Currier was liable, "[w]ithout passing on the soundness of Currier's arguments," stating that Currier should have raised these arguments at an earlier stage. (A-34.)

Currier's "Special Case"

In contrast to the affiliated directors, who were Adviser employees actively involved in and controlling the operation of the Fund and Adviser, Currier was a non-management director, with no special knowledge or expertise concerning recapture. (C.A. App. 1135-36; *see* C.A. App. 136-40, 164, 180, 185, 187, 195-97, 240.)[6] Currier never served as an officer or an employee of the Fund and was never involved in the Fund's day-to-day management. (C.A. App. 1135.)

Currier's sole connection with the Adviser was his ownership of Adviser securities. In 1964, Currier acquired 2% of the Adviser's capital stock, at a cost of $11,300, and $4,000 worth of the Adviser's six percent bonds. (C.A. App. 1134-35.) In 1968 and 1969, Currier reduced his stock interest to 1.2%. (C.A. App. 1135.) During the damage period (1967-1973), he received total dividend payments from the Adviser of $1,800, as well as interest on his bonds of at most $1,680, a cumulative total of

6. References in the form "C.A. App. " are to the joint appendix filed by the parties in *Fogel II*.

$3,480. (*Id.*) Currier was also a shareholder of the Fund. During the relevant period, he owned approximately 1000 of its shares, valued at between $4,400 and $8,000. (C.A. App. 1134.)[7]

Currier had no more knowledge about possible methods of recapturing brokerage commissions, or their availability or desirability to the Fund, than did any of the other unaffiliated Fund directors. (C.A. App. 1135-36.) What Currier knew he learned, as did the other non-management directors, from the management directors and counsel for the Fund. (C.A. App. 187-88, 1135-36.) As a result of what he learned Currier believed that the Fund had no potential for recovery of brokerage fees. (C.A. App. 164.)

The court of appeals concluded, after reviewing the testimony of Currier and the other non-management directors, that "it is not clear at all that any of these witnesses thoroughly understood the forms of recapture which the plaintiffs propose." (A-106.)

REASONS FOR GRANTING THE WRIT

This petition should be granted because the court below established an erroneous precedent that is (1) in conflict with the holding of the First Circuit in *Moses v. Burgin* and (2) inequitable and inconsistent with the rationale of both circuits' decisions as applied to petitioner Currier. The holding below is tantamount to creation of a *per se*, strict liability standard for breach of fiduciary duty under the Investment Company Act. This *per se* standard is inconsistent with *Moses v. Burgin*, in which the First Circuit held that intentional conduct is a prerequisite for liability for failure to inform unaffiliated fund directors about recapture. 445 F.2d at 384. No intentional or wrongful conduct on Currier's part was identified either by the court or by plaintiffs, who actually held him out to be the prototype of the uninformed outside director. Currier was unjustly condemned for an omission to communicate information that the court found he did not know.

7. Currier's only compensation from the Fund was receipt of fees for attending board meetings. (C.A. App. 1135.)

1. *The absence of proof of motive or knowledge required by Moses v. Burgin is fatal to the case against Currier.* In finding the "Management defendants" in *Moses* guilty of gross misconduct, the First Circuit stressed the intentional quality of their conduct:

> "Enough has been said to show that Management defendants were not guilty of mere negligence. They *knew* . . . that the possibility of recapture was a serious and unresolved issue in the industry. They also *knew* that it was an issue that involved a potential conflict between their interests and the interests of Fund's shareholders. Their failure to disclose the information available to them to the unaffiliated directors was the result of *neither inadvertence nor misapprehension of the facts.* . . . By *intentionally* pursuing a course of non-disclosure these defendants made the effective functioning of the mechanism protecting Fund from their overreaching impossible. . . . We therefore conclude that the Management defendants were guilty of gross misconduct. . . ."

445 F.2d at 384 (emphasis added).

The evidence shows that Currier, by contrast, believed in good faith that the Adviser could best serve the Fund by not diverting its energies into an unfamiliar area. (C.A. App. 235.) There was no showing that Currier believed that by refraining from recapture the Adviser could profit at the expense of the Fund or that, because of his small equity interest in the Adviser, Currier might indirectly realize some gain from a decision not to recapture. Currier thus stood in the position of the unaffiliated directors in *Moses v. Burgin*, whom the First Circuit exonerated from liability, on grounds they (a) lacked knowledge concerning, or motive to disfavor, recapture and (b) properly relied upon the expertise of the management defendants. 445 F.2d at 384.

2. *Application of a per se standard is inequitable and inconsistent with the rationale of the court below.* Although the court presumed that because Currier owned stock in the Adviser, he must be deemed to have favored the interests of the Adviser

rather than those of the Fund's shareholders, the bare fact of Currier's ownership of a minimal amount of Adviser shares was demonstrably inadequate to support such a presumption as applied to the issue of brokerage recapture. Moreover, because Currier also held an approximately equal ownership interest in the Fund, whatever presumption might have followed from Currier's interest in the Adviser should have been offset by a presumption in favor of the Fund. Because no evidence was introduced that Currier was knowledgeable about the complex issue of recapture, a *per se* standard is both inappropriate and inconsistent with the rationale behind both the First and Second Circuits' imposition of liability upon knowledgeable management directors.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

May 24, 1982

Respectfully submitted,

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